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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-339

RUTH ANN REED, as Administratrix of the Estate of DAN WILLIAM REED, deceased, and as parent, natural guardian, and best friend of CYNTHIA ANN REED, DEBORA LYNN REED and JULIE MARIE REED, all infants et al.,

Petitioners,

v.

FORWOOD CLOUD WISER, JR., and RICHARD E. NEUMAN,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Treaty Involved	2
Question Presented	2
Statement of Case	2
Argument	4
I. The Decision Below Is Clearly Correct	5
II. There Is No Conflict Of Decision	10
III. There Is No Important Question Of Federal Law	12
Conclusion	14

Table of Authorities

Cases:

Block v. *Compagnie Nationale Air France*, 386 F.2d 323, 337-38 (5th Cir. 1967) 6, 7, 13

Communist Party v. *Subversive Activities Control Board*, 376 U.S. 1, 71 (1961) 11

Day v. *Trans World Airlines, Inc.*, 528 F.2d 31, 36-38 (2d Cir. 1975) 6, 8, 13

Eck v. *United Arab Airlines, Inc.*, 15 N.Y.2d 53, 59 (1964) 255 N.Y.S.2d 249, 252 6

PAGE

Evangelinos v. *Trans World Airlines, Inc.*, 550 F.2d 152 (3d Cir. 1977) 6

Geofroy v. *Riggs*, 133 U.S. 258, 270 (1889) 8

In re Pago Pago Air Crash of January 30, 1974, 419 F.Supp. 1158 (C.D.Cal. 1976) 11

In re Paris Air Crash of March 3, 1974, 399 F.Supp. 732 (C.D.Cal. 1975) 8

Jones v. *Archibald*, 45 A.D.2d 532 (4th Dept. 1974) .. 11

Lutz Feed Co., Inc. v. *Audet & Company, Inc., et al.*, 72 Misc.2d 28 (1972) 11

Maximov v. *United States*, 299 F.2d 565, 568 (2d Cir. 1962) aff'd 373 U.S. 49 (1963) 8

Michaels v. *Lipenana Holding Corp.*, 11 A.D.2d 12 (1st Dept. 1960) 9, 11

Pierre v. *Eastern Airlines, Inc.*, 152 F.Supp. 486 (D.N.J. 1957) 10

Rosman v. *Trans World Airlines, Inc.*, 34 N.Y.2d 385 (1974), 358 N.Y.S.2d 97 6

Treaties:

Warsaw Convention, 49 Stat. 3000, et seq. 2, 6

Montreal Agreement CAB 18990, Order E-23680 ... 3

Statutes:

Death on the High Seas Act, 46 U.S.C. Sec. 761, et seq. 3, 9

28 U.S.C. Secs. 1332, 1333 3

Other Authorities:

PAGE

Aeronautical Statutes and Related Materials, pp. 512-514 (C.A.B. 1974) 10

Agreement CAB 25632, Docket No. 28713, Order 77-7-85, dated July 20, 1977 13

Aviation Law Reporter (CCH) Vol. 3 (looseleaf), ¶ 27,054, pp. 24,059-2, 24,059-3 4

H. Drion, *Limitations of Liabilities in International Air Law*, 158 (1954) 6

Martin, *Death and Injury in International Air Transport*, 41 J.Air. L. & Com. 255, 256 4

2A *Warren's Negligence*, Sec. 3.03, pp. 50-55 11

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RESPONDENTS' BRIEF IN OPPOSITION

Opinions Below

The Opinion of the Court of Appeals is reported at 555 F.2d 1079 and also appears in petitioners' separate Appendix to the petition (A28a). The Opinion of the District Court is reported at 414 F.Supp. 863 and also appears in petitioners' Appendix (A61a).

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition.

Treaty Involved

The Treaty involved in this litigation is officially entitled "Convention For The Unification Of Certain Rules Relating To International Transportation by Air". It is commonly known as the Warsaw Convention. The official French text is reported at 49 Stat. 3000 and the unofficial English translation is reported at 49 Stat. 3014, T.S. No. 876. Adherence of the United States was proclaimed on October 29, 1934, 49 Stat. 3013. Articles 17, 20, 22, 24 and 25 of the French text and English translation are set forth in the petition at pages 3-6.

Question Presented

When employees of an air carrier are sued individually in actions governed by the Warsaw Convention are they entitled to the protection of the Treaty's limitations of liability or is that protection only for the benefit of their employers?

Statement of the Case

This action arises out of the crash of a Trans World Airlines, Inc. (T.W.A.) 707 jet aircraft into the high seas approximately 50 nautical miles west of Cephalonia, Greece, on September 8, 1974 (R.7 ¶ 3).* All aboard died in the crash. Petitioners-plaintiffs allege that a bomb or other explosive device was permitted to be placed or carried aboard the aircraft and that it exploded shortly after tak-

* References preceded by "R" refer to pages in the record contained in the Joint Appendix, filed in the Court of Appeals.

ing off from Athens, Greece, causing the loss of control of the aircraft and its crash into the Ionian Sea (R.7 ¶ 6).

Petitioners, the personal representatives of the estates of 9 of the passengers, sue in negligence to recover wrongful death damages from defendants-respondents, the then President of T.W.A. and the Staff Vice-President of Audit and Security of T.W.A. (R.7 ¶¶ 4, 5). T.W.A. is not named as a defendant in this action, although it is sued by these petitioners in a separate action pending in the Southern District of New York (75 Civil 3136). Jurisdiction in the District Court is based upon 46 U.S.C. Sec. 761 et seq., The Death on the High Seas Act. Jurisdiction is also alleged under 28 U.S.C. Secs. 1332, 1333 and the general maritime law (R.7).

In their Second Affirmative Defense the defendants pleaded the decedents' transportation was governed by the provisions of the Warsaw Convention, as amended by the Montreal Agreement,* and that defendants' liability, if any, was limited to a maximum of $75,000.00 for the death of each passenger (R.26-28). Plaintiffs' motion to strike this defense as legally insufficient was granted by the District Court (R.286; A.6b). On defendants' motion, the District Court certified the question for an interlocutory appeal to the Court of Appeals (R.302). The Court of Appeals thereafter granted defendants leave to appeal (R.303). Jurisdiction of the Court of Appeals is based on the Interlocutory Appeals Act, 28 U.S.C. Sec. 1292(b). The Court of Appeals reversed the Order of the District Court "with instructions to reinstate defendants' defense based on that Convention", 555 F.2d at 1079; A.57a-59a. Petitioners' motion for rehearing or rehearing *en banc* was denied (A.60a).

* Agreement Relating To Liability Limitations Of The Warsaw Convention And The Hague Protocol, Agreement CAB 18990, approved by order E-23680, May 13, 1966 (Docket 17325). This Agreement has the general effect of increasing the Treaty's limits to $75,000, and imposing absolute liability on the carrier.

ARGUMENT

Petitioners make no claim that the Warsaw Convention Treaty is unconstitutional. A mere reading of their petition demonstrates that all they are claiming is that the Court of Appeals' decision is erroneous. Their petition offers nothing more than the same arguments, in abbreviated form, which the Court of Appeals so emphatically rejected. They cite no new or different cases to support their arguments; the ten cases cited in the petition were also cited to and considered by the Court of Appeals.

The Warsaw Convention has been the supreme law of the land since this country adhered to that treaty in 1934. Yet during the 43 years that have elapsed since that time and the decision below, only one court was ever called upon to decide whether the treaty's limitation of liability applied to the airline's *employee* as well as his employer. Surely, this lends strong support for the conclusion that the courts, the bar and the public had always accepted what the Court of Appeals determined—that the limitation applied to both. This conclusion is fortified by the fact that the Warsaw Convention is undoubtedly the subject of more litigation in the United States than any other treaty. See, Martin, *Death and Injury in International Air Transport*, 41 J. Air L. & Com. 255, 256 (1975).

The petitioners' arguments, if accepted, would render this treaty* meaningless. Their contention, that the limitation of liability in Article 22(1) applies only to the "carrier", simply because "servants" or "employees" are not specifically mentioned (Petition, Point II, p. 8), is based upon nothing more than a strict literal reading of the

* As of July, 1976, there were approximately 114 member nations which were parties to the Warsaw Convention. Aviation Law Reporter (CCH) Vol. 3 (looseleaf), ¶ 27,054, pp. 24,059-2, 24,059-3.

treaty without any thought given to the purposes and objectives of the treaty or to what the Convention's delegates sought to accomplish. Judge Mansfield, in his opinion in the Court of Appeals (A.28a, A.55a), said of this approach:

> "It is difficult to imagine an interpretation more at odds with the acknowledged purposes of the Convention than that for which [petitioners] press." 555 F.2d at 1092.

On the single and narrow issue involved in this case the decision of the Court of Appeals was clearly correct. There is no asserted conflict of decision with any other Circuit. In light of the treaty's fundamental purpose to regulate the liability of the air carrier in a uniform manner, no other result could have been reached.

I.

The Decision Below Is Clearly Correct

After a thorough and searching examination of the entire Warsaw Convention, including its relevant provisions, legislative and subsequent history, and overall purposes, the Court of Appeals concluded that unless the liability limits of the treaty applied to the carrier's employees the objectives of the treaty's pertinent provisions would be frustrated. The Court of Appeals noted that if the treaty's uniform liability limitations could be circumvented by the simple device of suing the carrier's employees, as was done in this case, the entire character of international air disaster litigation involving aircraft of American air carriers would be radically changed because the air carriers then would be forced to provide indemnity to such employees, if they had not already done so, for recoveries higher than the uniform limits specified in the treaty (A.32a). The consequence of such suits was pointed out

by Judge Mansfield (A.48a):

> "To permit a suit for an unlimited amount of damages against a carrier's employees for personal injuries to a passenger would unquestionably undermine this purpose behind Article 22, since it would permit plaintiffs to recover from the carrier through its employees damages in excess of the Convention's limits. This impact was recognized by Professor Drion prior to the Hague Conference when he urged that the interpretation presently sought by [respondents] be given to the Warsaw provisions:
>
> > 'Any other solution would defeat the purpose of Article 24, which is to prevent claimants from avoiding the provisions of the Convention by suing the enterprise outside the contract of carriage.'
>
> H. Drion, Limitations of Liabilities in International Air Law 158 (1954)." 555 F.2d at 1089.

Judge Mansfield then noted that "Virtually all delegates . . . agreed that unless the limits applied the Convention's pertinent provisions would be frustrated." (*id.*).

It cannot be disputed that the Warsaw Convention's most fundamental objective is to provide a uniform system of liability and litigation rules for international air disasters. Not only was the Court of Appeals of this view (A.55a) but the treaty itself, in its Preamble, clearly articulates this desired uniformity of liability, 49 Stat. 3000, 3014. See, also, *Block* v. *Compagnie Nationale Air France,* 386 F.2d 323, 337-38 (5th Cir. 1967); *Eck* v. *United Arab Airlines, Inc.,* 15 N.Y.2d 53, 59 (1964), 255 N.Y.S.2d 249, 252; *Rosman* v. *Trans World Airlines, Inc.,* 34 N.Y.2d 385, 396 (1974), 358 N.Y.S.2d 97, 106; *Day* v. *Trans World Airlines, Inc.,* 528 F.2d 31, 36-38 (2d Cir. 1975); *Evangelinos* v. *Trans World Airlines, Inc.,* 550 F.2d 152 (3d Cir. 1977). It is clear, therefore, that the Court of Appeals' decision accomplishes the desired uniformity intended by the Convention delegates. In the *Block* case, *supra,* the Court of Appeals for the Fifth Circuit rejected an argument by plaintiffs almost identical to that made by petitioners. In *Block* the plaintiffs contended that charter flights, as distinguished from regular scheduled commercial flights, were not covered by the Warsaw Convention because nowhere in the treaty was the term "charter" referred to. In rejecting this argument Judge Wisdom said:

> "It ignores the position of a number of Citeja members and others who assumed the applicability of the Warsaw Convention to the contract of carriage resulting from voyage charter. . . . It underestimates both the vision of the men who drafted the convention and the tenacity with which they held to their objective of creating uniformity in the area of the carrier's responsibility to its passengers and shippers." 386 F.2d at 338.

One of such men was Professor Ambrosini of Italy, a delegate and author of the draft convention submitted to the conference at Warsaw. The Court below quoted Ambrosini's views (A. 35a, A. 36a) that:

> "'He had always thought that the Warsaw Convention regulated not only the liability of the carrier, but, at the same time, that of his servants or agents, and *especially for the simple reason that, in his opinion, the carrier and his servants or agents were, from the legal point of view, the same person.*'"
>
> • • •
>
> "Later Professor Ambrosini expanded on this interpretation:
>
> > 'As to the more general question whether the Warsaw Convention provided for the limitation of liability of the servants or agents, his opinion was that, under the general legislative and legal system, servants and agents, as the *longa manus* of their

employer, would enjoy the same situation as the latter. From the legal point of view, there could not be a system whereby the carrier would be liable with limits and the servants and agents without limits.'" 555 F.2d at 1084. (Emphasis by Court.)

Throughout this litigation petitioners have pressed for a literal interpretation of this treaty. Such an approach has not only been rejected by this Court, but also by a number of appellate court decisions interpreting the Warsaw Convention (see, A.45a-A.47a). The literal and restricted views contended for by petitioners assume an intent on the part of the Warsaw delegates that they wished to plant the seed of the treaty's own destruction. Such an intent cannot be allowed. *Geofroy* v. *Riggs,* 133 U.S. 258, 270 (1889). The specific words of this treaty should be given "a meaning consistent with the genuine shared expectations of the contracting parties." *Maximov* v. *United States,* 299 F.2d 565, 568 (2d Cir. 1962), aff'd 373 U.S. 49 (1963). Moreover, petitioners' contention has the effect of frustrating the delegates' goal of providing not only a uniform limited liability, but also a durable and flexible system of law, *Day* v. *Trans World Airlines, Inc.,* 528 F.2d, at 38.

Judge Mansfield also quite properly calls attention to the "judicial nightmare" that would ensue if petitioners' position were upheld (A.53a, A.54a). His concern with respect to the problems of applicable law facing the court in *In re Paris Air Crash of March 3, 1974,* 399 F.Supp. 732 (C.D.Cal. 1975) are justifiable. The choice of law problem in that litigation was aimed primarily at the aircraft manufacturer's liability, a liability which is not subject to the Warsaw Convention's provisions. One can readily imagine, therefore, the *additional* choice of law problems facing a court in a similar air crash disaster if petitioners' arguments are adopted. Thus, if the airline's employees are

not protected by the treaty's limitation of liability, additional problems of applicable law would be injected into litigation against the employee, e.g., whether ordinary negligence or willful misconduct must be proved against the employees; whether the employees are absolutely liable, as are their employers, under the Montreal Agreement; whether the treaty's jurisdictional-venue provisions in Article 28(1) take precedence over local rules; whether the treaty's two year statute of limitations in Article 29(1) applies. Other questions concerning the employees' relationship with other provisions of the treaty are not too difficult to imagine. These difficult questions are very real and, as Judge Mansfield noted (A.54a, A.55a), could very well arise in the numerous lawsuits arising out of the recent collision of two Boeing 747 aircraft in the Canary Islands which killed over 550 persons.*

The fallacy of petitioners' contentions has clearly been demonstrated by the decision of the Court of Appeals. That decision affords a sensible meaning to the treaty's pertinent provisions. That decision does not in any way burden the effective administration or application of its terms. Indeed, it reinforces our own ties with foreign nations with regard to international air transportation. It is the right decision.

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* Indeed, similar questions have already been raised in the District Court in this case, i.e., whether the respondents, corporate officers of T.W.A., are legally responsible for the alleged nonfeasance under New York law, *Michaels* v. *Lipenard Holding Corp.,* 11 A.D.2d 12 (1st Dept. 1960), *if* New York law applies, rather than the law of New Jersey the place of their residence and where this action was originally commenced. In view of the fact that this accident occurred on the high seas, it may be that maritime law is applicable, 46 U.S.C. § 761, et seq. Similar issues are undoubtedly lurking in the background.

II.

There Is No Conflict of Decision

Petitioners do not and cannot show that the Court of Appeals' decision conflicts with any decision on this issue rendered by any state court or federal appellate court. Judge Mansfield's review of the case law clearly demonstrates that the within action is the only case to ever discuss and thoroughly consider the precise issue of whether the treaty's limitation of liability applies to the airline's *employees* (A.44a, A.45a, fn. 11). *Pierre* v. *Eastern Airlines, Inc.*, 152 F.Supp. 486 (D.N.J. 1957), the only other case ever confronted with this same issue, merely concluded in one short paragraph, and without any discussion or examination of legislative history, that the employee was not covered by the limitation. Judge Mansfield properly gave short shrift to *Pierre,* as have petitioners in their own petition. Although they contend in their petition (p. 10) that the Court of Appeals' decision in this case is in "direct conflict" with *Pierre* they make the same contention with respect to the *Stratton* case (Petition, p. 10), notwithstanding Judge Mansfield's clear statement as to why *Stratton* was not applicable (A.44a, fn. 11).

In addition, the decision of the Court of Appeals does not conflict with any known decision of any foreign tribunal. In view of the fact that 74 foreign nations have adopted or adhered to the Hague Protocol, *Aeronautical Statutes and Related Material,* pp. 512-514 (Civil Aeronautics Board 1974), it is extremely doubtful if there will ever be a conflicting decision on this issue in view of Article 25A of that Protocol.

Furthermore, petitioners cannot claim that the decision of the Court of Appeals will cause them immediate or irreparable injury. The Court of Appeals merely remanded

this case to the District Court with instructions to reinstate respondents' Warsaw-Montreal defense. It is still an open question as to the ultimate outcome of this litigation. Conceivably, petitioners may, upon proper evidence at the trial, obtain a jury verdict against respondents based upon willful misconduct and thereby be in the position to obtain damages in excess of the treaty's monetary limits. Or, they may establish willful misconduct against T.W.A. in their separate action against that defendant. Judge Pierson Hall, one of the most experienced Judges in the handling of aircraft accident litigation, adopted a similar approach when faced with the issue of the constitutionality of the Warsaw Convention. Judge Hall ruled that the determination of initial threshold questions of fact by the jury could make it unnecessary to decide that issue. See, *In re Pago Pago Air Crash of January 30, 1974,* 419 F.Supp. 1158 (C.D. Cal. 1976).

It is also possible that respondents, who performed their duties for T.W.A. in New York City, might be dismissed from this action on the ground that corporate officers are not liable as a matter of law for the alleged nonfeasance of these officers under New York law (R.7, ¶¶ 4-6). See, *Michaels* v. *Lipenard Holding Corp.,* 11 A.D.2d 12 (1st Dept. 1960); *Jones* v. *Archibald,* 45 A.D.2d 532 (4th Dept. 1974); *Lutz Feed Co., Inc.* v. *Audet & Company, Inc., et al.,* 72 Misc.2d 28 (1972); *2A Warren's Negligence,* § 3.03, pp. 50-55. Therefore, it clearly appears that petitioners are claiming nothing more than a possible or potential impairment of their ability to recover damages in excess of the treaty's limits. Such a possibility or contingency should not be sufficient to warrant review by certiorari. Cf. *Communist Party* v. *Subversive Activities Control Board,* 367 U.S. 1, 71 (1961). The issue in this case is uniquely narrow, and no amount of strained semantics with respect to supposed "conflicts" can convert it into one warranting review by this Court on certiorari.

III.

There Is No Important Question of Federal Law

While Judge Mansfield did say that this case presented an important question, he also indicated that the question was "novel" and was for the first time raised at the federal appellate level. So far as is known, this precise issue has never been raised in any state court or foreign tribunal. It can be reasonably said that in the 40 odd years since this treaty has been the law in this country, this is the *only* case which has ever delved into the specific issue of whether the carrier's *employees* are entitled to the limitation as well as their employer. Judge Mansfield's discussion of the cases in footnote 11 of his opinion (A.44a, A.45a) demonstrates that fact. However, the fact that this is the *only* case is not of the importance to warrant a review by this Court on certiorari. As mentioned above, there is no conflict on this issue with any of the other circuits. Nor can there be any conflict with the two District Court cases referred to by petitioners (petition, p. 8, fn. 6). The Pago, Pago aircraft accident litigation is set for trial during the week of October 3, 1977 in the Central District of California. In preparing for that trial the Court very recently followed Judge Mansfield's decision and denied plaintiffs' motion to strike the Warsaw defense pleaded by the airline's employees. In the other litigation referred to by petitioners, at JFK International Airport, it is respondents' understanding that no motions have been made attacking the Warsaw defense pleaded by the airline's employees. Even if such a motion is made it is obvious that the Eastern District of New York would be bound by the Second Circuit's decision in the instant case. Therefore, there are no decisions pending in aircraft accident litigation which are in conflict with the Second Circuit's decision.

It must also be considered that the Court of Appeals' decision does not leave the law regarding this treaty in an

unsatisfactory state. It is consistent with the expectations of the Warsaw Convention delegate who authored the draft Convention; it is consistent with the primary aim of the treaty, as announced in its Preamble, to obtain the advantages of regulating the liability of the carrier in a uniform manner; it is consistent with the law of those 74 member nations who have adopted the Hague Protocol, and its Article 25A; it is consistent with the views expressed by the Secretary of State which accompanied the President's letter of transmission of the Convention to the Senate in 1934 (see A.47a); and it is consistent with the continued efforts of the United States to improve the benefits accorded to passengers under this Treaty. See, *Day* v. *Trans World Airlines, Inc.*, 528 F.2d 31, 36-38 (2d Cir. 1975); see, also, Judge Mansfield's observations with respect to current efforts in this area, A.47a, A.48a, fn. 12.* Needless to say, had the Court of Appeals' decision been in petitioners' favor, the law regarding this treaty would indeed be in a very unsatisfactory state.

In view of the above, it is respectfully submitted that the petition does not present any "important" question of federal law that should be decided by the Court. *Block* v. *Compagnie Nationale Air France,* 386 F.2d 323 (5th Cir. 1967), *cert. den.* 392 U.S. 905, also presented a novel and important question arising under the Warsaw Convention.

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* On July 20, 1977, the Civil Aeronautics Board approved an agreement to establish a Supplemental Compensation Plan pursuant to Article 35A of the Warsaw Convention, as amended by the Protocols at The Hague, 1955, and Guatemala City, 1971, and by the Additional Protocol No. 3 of Montreal, 1975. The Board's order discusses in detail the background, history and purposes of these amendments and explains the benefits of the amendments to the passengers and carriers. See, *Agreement CAB 25632, Docket No. 28713, Order 77-7-85.* In addition, the Senate Foreign Relations Committee is scheduled to vote on the advisability of the Senate ratifying Additional Protocol No. 3 of Montreal, 1975, during the week of September 26, 1977. If ratified, Protocol No. 3, which encompasses the Protocols of Hague and Guatemala, would replace the Warsaw Convention.

The issue in that case was whether a civilian *charter* flight was subject to the provisions of the treaty. Judge Wisdom of the Fifth Circuit said it was. This Court denied certiorari. Manifestly, there is no important question of Federal law requiring decision by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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